Supreme Court, U.S.
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No. 90-1238

In The

Supreme Court of the United States

October Term, 1990

LESLIE R. DERSTEIN,

Petitioner,

v.

PAGE BENSON, J. PATRICK BRAZIL, and JOHN JAWORSKY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents perceive the correct issue to be whether pre-termination due process requirements are met when an employee is given general information of the nature of the charge against him, the name of a complaining party, has ten days in which to act, and has the opportunity for a full post-termination hearing?

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STATEMENT OF THE CASE

Respondents have no quarrel with petitioner's statement of facts until page seven, last paragraph. At the May 7 meeting, petitioner responded to Judge Benson and Mr. Seyb. Petitioner stated, *inter alia*: "Something fishy is going on," "I evidently had been framed," "they have been getting a lot of lies," and "if that is what it takes to get something, then I guess I will have to start lying." (Tr. 11/8/88, p. 128, Tr. 11/11/88, pp. 671-672). The judges testified petitioner was given ten (10) days from the meeting to act, out of fairness, to give petitioner an opportunity to obtain counsel and to give any other response. (Tr. 11/11/88, pp. 607, 608, 645, 673 and 674). The personnel handbook's

applicable rules dictated immediate termination. Petitioner's ex. 14, pp. 23, 24. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) was not yet decided.

Later the same day, petitioner retained attorney Gene White to represent him. Mr. White discussed the matter with Administrative Judge Page Benson and told Judge Benson "you may be able to fire Les [Derstein] for several reasons but you can't fire him for this reason, and you're doing it the wrong way." (Tr. 11/9/88, p. 284). Mr. White never attempted to obtain the transcripts. (Tr. 11/9/88, p. 285). The respondents felt they had no right to have further contact with petitioner regarding this matter because he was represented by counsel. (Tr. 11/11/88, pp. 608, 609, 626, 674, 676, 689). Petitioner remained on the job and received benefits through May 17, 1981. (Tr. 11/8/88, p. 132). Mr. White did not seek a stay of termination of petitioner's benefits pending outcome of his appeal though this opportunity was available under the personnel rules. (Tr. 11/9/88, pp. 288, 289; petitioner's ex. 14, p. 36).

On May 18, 1981, Mr. White filed an appeal letter which stated:

> The basis for the appeal is that in the 9½ years Mr. Derstein worked for the Court Services he has *never* received either an oral or written reprimand for "sexual harassment."
>
> That the enumerated "just causes for immediate discharge" are inclusive in nature and the "sexual harassment over an extended period" is not one of the enumerated just causes. Petitioner's ex. 39, p. 9.

Petitioner conceded at trial that denying receipt of a reprimand for sexual harassment is different from denying that he committed sexual harassment. (Tr. 11/9/88, p. 240). In his appeal letter, petitioner did not deny that he sexually

harassed anyone. The appeal panel did not perceive any question of fact, so there was no hearing and, in a 2-1 decision, the termination was upheld. Respondents' ex. C. After this final decision was rendered, petitioner filed a motion for hearing, contending for the first time to the appeal panel that there was a factual dispute. Respondents' ex. D. The appeal panel denied the motion unanimously, ruling the appeal document controlled, and once the final decision was rendered, the panel lost jurisdiction. Respondents' ex. E. Petitioner had further review available under Kan.Stat.Ann. § 60-2101(d), but did not pursue this avenue. (Tr. 11/9/88, p. 289, pet.'s app. p. A45). Judge Walton testified that had petitioner denied the fact of harassment in the original appeal document, a hearing would have been granted. (Depo. of Herbert Walton, pp. 74, 75). The appeal panel members were also defendants in this action, received summary judgment, and no appeal of that ruling was pursued.

RESPONSE TO DENY GRANTING THE WRIT

I. PETITIONER MISSTAKES THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS

The Tenth Circuit held that a public employee who has been accused of sexual harassment by female employees received sufficient pre-termination due process when that employee is advised of the nature of the accusations, given the name of a complainant, and has ten additional days from the time of the pre-termination meeting before benefits are terminated. Pet.'s app. A15-A17. The Circuit examined the post-termination procedures available to petitioner in determining whether the dictates of the subsequently decided *Loudermill* were met. Satisfied that the post-termination opportunity for hearing was sufficient, the Court decided that the minimal due process requirements were met.

Stripped to its essentials, petitioner's argument contends that a full adversarial hearing is required at the pre-termination hearing stage. The Tenth Circuit rejected this argument based upon this Court's ruling in *Loudermill*. Pet.'s app. A15. In *Loudermill*, this Court specifically rejected the necessity of such a hearing at the pre-termination stage where an appropriate post-termination hearing is available. 470 U.S. at 545-546. The Tenth Circuit recognized that based upon undisputed evidence an appropriate post-termination hearing was available, and petitioner does not attack this finding. If petitioner wishes this Court to modify or overrule *Loudermill* and transform Justice Marshall's concurrence to the rule (*see* 470 U.S. at 548), he should do so in a straightforward manner.

Due process is a flexible concept. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). The determination of what process

is due depends upon a case-by-case analysis. *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976), *quoting Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The competing interests involved at the pre-termination level are the employee's interest in his state employment and the ability of the government employer to make personnel decisions. *Bishop v. Wood,* 426 U.S. 341, 349-350 (1976). The pre-termination hearing is only an initial check against mistaken decisions. *Loudermill,* 470 at 545-546. In this case, the evidence was undisputed that petitioner had an opportunity for a full post-termination hearing. (Tr. 11/9/88, pp. 209-212). Furthermore, petitioner testified that even after seeing each of the transcripts, attending the depositions of each complainant, observing all discovery, and after years of litigation, he had nothing to add to what he said to the respondent judges on May 7, 1981, (Tr. 11/9/88, p. 269), reaffirming the Tenth Circuit ruling that petitioner's pre-termination due process was adequate.

Finally, in his appeal document to the appeal panel, petitioner raised no factual issues which required an evidentiary hearing. Petitioner was given full consideration of the legal issues he raised. It was only after petitioner lost on the legal issue that petitioner decided to attack the factual basis. The petitioner had the opportunity for a hearing if only he denied sexual harassment in the appeal document. Because he did not do so, the appeal panel did not hold an evidentiary hearing. The respondents had no involvement in the appeal proceedings.

CONCLUSION

These respondents knew both the complaining persons and petitioner. They knew that for several years they had morale problems in an office that contained only four Court Service officers and one secretary. After learning of the complaints about petitioner, they understood the source of the problems. Finally, after petitioner was removed, the problems evaporated. (Tr. 11/11/88, pp. 598, 632, 679).

The Tenth Circuit opinion approves reasonable actions to be taken to protect female employees from abusive supervisors such as petitioner. These respondents were satisfied after their meeting with petitioner on May 7, 1981, that they had no mistaken impressions: The complainants accused petitioner of acts which respondents believed to be sexual harassment, as well as offensive; petitioner denied what he did was sexual harassment. Subsequent events have done nothing to change their belief.

It is respectfully requested the petition be denied.

Respectfully submitted,

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